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NO. .....

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

JACK OSBORN WATSON,
JEFFREY CRAIG EVENSON
and
DALE STANLEY BROWNING,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the nighttime stop and boarding of the petitioner's vessel on the high seas by the United States Coast Guard, without any suspicion of non-compliance with document and safety regulations or any founded suspicion that criminal activity was afoot, violate the Fourth Amendment protection against unreasonable searches and seizures?

2. What effect should the fact that the Coast Guard used its document and safety inspection authority as a pretext or subterfuge to search for marijuana and other contraband have on the Fourth Amendment determination?

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ON WRIT OF CERTIORARI TO THE
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PETITION FOR WRIT OF CERTIORARI

This is a petition for JACK OSBORN WATSON, JEFFREY CRAIG EVENSON and DALE STANLEY BROWNING for a Writ of Certiorari to review the Order made by the United States Court of Appeals for the Ninth Circuit on June 2, 1982, reversing the decision of the District Court which had

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The parties shown above are the only parties to this proceeding.

granted petitioners' motion to suppress evidence. The United States Court of Appeals for the Ninth Circuit ruled that a Coast Guard document and safety inspection of a 40-foot sailing vessel on the high seas after dark pursuant to an administrative plan, but without even a founded suspicion of non-compliance, was reasonable and did not violate the Fourth Amendment. The Court reached this decision even though the admitted purpose of the "administrative plan" was to enable the Coast Guard to board vessels and search for controlled substances. In other words, the Court found that the stop and search of petitioner's vessel was reasonable under the Fourth Amendment despite the concession by the Government that the strategy of the Coast Guard was to use its broad authority to conduct document and safety inspections under 14 U.S.C. § 89(a) as a subterfuge and pretext to conduct searches for contraband.

OPINIONS BELOW

To the petitioners' knowledge, the Opinion in the United States Court of Appeals for the Ninth Circuit, reversing the District Court's decision, has been officially reported but has not as yet been published. (A copy of the Opinion is attached hereto as Appendix "A".)

JURISDICTION

1. On December 17, 1981, the Federal Grand Jury for the Southern District of California returned a Three-Count indictment against petitioners. Count One charged a conspiracy under Title 21, United States Code Sections 955(a) and 955(c), to possess marijuana on the high seas with intent to distribute

Count Two charged the substantive offense of possession of marijuana on the high seas with intent to distribute, in violation of Title 21, United States Code Section 955(a). Count Three charged a conspiracy under Title 21, United States Code Sections 952, 960 and 963, to import marijuana.

2. On February 24, 1981, an evidentiary hearing on the motions to suppress evidence filed by the petitioners was held before the Honorable Leland C. Nielsen, United States District Court Judge for the Southern District of California. After the taking of limited testimony, Judge Nielsen granted petitioners' motions to suppress, concluding that a Customs' safety search by the United States Coast Guard nearly a thousand miles from United States waters could not be justified under Title 14, United States Code Section 89(a). On March 16, 1981, the Government filed a Motion for Reconsideration of Order Suppressing Evidence. At a hearing held on April 6, 1981, Judge Nielsen granted reconsideration, but re-affirmed the previous Order granting the motions to suppress. The Government thereafter filed a timely Notice of Appeal.

3. On June 2, 1982, the United States Court of Appeals for the Ninth Circuit reversed the decision of the District Court. Petitioners sought further review of the Panel's Opinion from the entire Court by filing a Petition for Rehearing En Banc, but the suggestion for an en banc rehearing was rejected on August 19, 1982.

4. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Fourth Amendment to the United States Constitution:

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

2. Title 14, U.S.C. § 89(a):

"(a) The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessels subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiry, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to

arrest is being, or has been committed, by any person, such person shall be arrested, or if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to a fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized."

STATEMENT OF FACTS

On December 7, 1980, at approximately 3:30 p.m., a helicopter attached to the United States Coast Guard Cutter VENTUROUS, sighted the vessel GLOBE TROTTER, a 40-foot sail boat bearing California registration CF 1201 ET, in international waters on the high seas proceeding in a west-northwesterly direction, approximately 120 miles southwest of the tip of Baja California, Mexico.[1] The sighting was reported to Commander Richard B. Chapman, Commanding Officer of the VENTUROUS, who ordered a course change

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[1]The VENTUROUS, with a Coast Guard helicopter and aviation detachment on board, left Terminal Island, California, on November 28, 1980, for a two-week law enforcement patrol. The area of patrol was approximately 100 miles west of the mouth of the gulf of California via specified weigh points and return.

to intercept the GLOBE TROTTER.[2]

The GLOBE TROTTER was sighted shortly after 6:00 p.m. Because it was dark, the VENTUROUS' "stripe-lights" were energized when it was 4,000 yards away, which illuminated the vessel's large orange stripes and Coast Guard insignia on the hull. At 6:39 p.m., the VENTUROUS radioed the GLOBE TROTTER, identified itself as the United States Coast Guard, and ordered the GLOBE TROTTER to douse sail, heave to, and stand by to receive a small boarding party. The GLOBE TROTTER's position at this time was approximately 105 miles south-southwest of Cabo San Lucas, almost 1,000 miles from United States waters.

Three persons were dispatched in the boarding vessel. Commander Chapman instructed them to make a standard Coast Guard document and safety inspection, filling out Coast Guard form 4100, which covered safety equipment, -- floatation devices, pollution control, marine toilet inspection, document inspection and the like. Commander Chapman did not instruct them to search for marijuana, nor did he have reason to suspect that any contraband was on board the GLOBE TROTTER.

The boarding party arrived at the GLOBE TROTTER

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[2]As part of a "general administrative plan," Commander Chapman was ordered to board and inspect all United States vessels less than 200 feet in length found in specific windows or corridors located at established points in the Pacific. The purpose of the plan was to "attempt to interdict vessels of American registry which were involved in drug trafficking which vessels carry controlled substances destined for the United States." During the patrol five vessels besides the GLOBE TROTTER were boarded.

at approximately 7:02 p.m. The crewmen identified themselves to the three occupants of the GLOBE TROTTER, petitioners WATSON, EVENSON and BROWNING. and stated that they were going to make "a standard Coast Guard document and safety check." Petitioner WATSON identified himself as the owner and operator of the boat, and stated that petitioners EVENSON and BROWNING were the only other persons on board. As the boarding party entered the cabin to inspect the vessel's registration papers, one of the crewmen immediately noticed a heavy odor of marijuana. Almost simultaneously, a radio transmission from the VENTUROUS was heard ordering the boarding party to muster the crew of the GLOBE TROTTER on the fantail of the vessel, to conduct a pat-down search for weapons, and to search the vessel.

The radio transmission had been prompted by Commander Chapman's observation of 40 to 50 boxes floating in the water at positions consistent with their having come from the GLOBE TROTTER. These boxes in fact had been jettisoned from the GLOBE TROTTER in response to the Coast Guard's announcement that they intended to board and inspect the GLOBE TROTTER.

The search of the vessel led to the discovery of a cardboard box containing marijuana in the forward sail locker. This box was similar to the boxes found floating in the water. Eighteen such boxes were recovered, while the remaining sank. Each box contained roughly 24 pounds of marijuana.

REASONS WHY THE WRIT SHOULD BE GRANTED

In *Coolidge v. New Hampshire*, 403 U.S. 443, 461, 91 S. Ct.

2022, 2035 (1971), Justice Steward included within his opinion the oft-quoted statement that, "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." In agreeing with the First, Fourth, Fifth and Eleventh Circuits that the Coast Guard has *carte blanche* authority to stop and board American vessels on the high seas to conduct document and safety inspections, the Courts have, in effect, emasculated the very constitutional principles which these famous words were based upon in relation to American citizens who step on board a United States registered vessel. Besides violating the principles recently established by this Court in *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391 (1979), followed by the Ninth Circuit in *United States v. Piner*, 608 F.2d 358 (1979), the unconscionable result reached by these Courts totally ignores the great body of Fourth Amendment law formulated by the Court in such noteworthy decisions as *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968); *Almeida-Sanchez v. United States*, 413 U.S. 266, 93 S. Ct. 2535 (1973); *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S. Ct. 2574 (1975); *United States v. Ortiz*, 422 U.S. 891, 95 S. Ct. 2581 (1975); and *United States v Martinez-Fuerte*, 428 U.S. 543, 96 S. Ct. 1374 (1976).

If the Court continues to refuse to grant certiorari to review this important issue, the Court will be condoning conduct which offends the very spirit of the Fourth Amendment. It is hard to believe that the Founding Fathers envisioned an exception to the Fourth Amendment which authorized midnight, warrantless administrative searches designed to produce evidence of a crime, but based on no suspicion of wrongdoing. However, such is the current state

of the law, in which an illegal alien has more protection on land than does an American citizen at sea. To allow this absurd situation to remain a viable concept in American jurisprudence is to make a mockery of the Fourth Amendment protections guaranteed every American citizen.

Due, therefore, to the conflict of the decisions of the various Circuits and this Court's decision in *Prouse*, which has resulted in the sanctioning of the type of conduct which is reminiscent of the practices employed by the English which helped lead to the Revolutionary War, there can thus no longer be any doubt that the granting of certiorari is absolutely necessary in order to maintain the integrity of the criminal justice system.

ARGUMENT

A. The Nighttime Stop And Boarding Of The GLOBE TROTTER, Without Any Suspicion Of Non-compliance With Document And Safety Regulations Or Any Founded Suspicion That Criminal Activity Was Afoot, Violated The Fourth Amendment Protection Against Unreasonable Searches And Seizures.

While *United States v. Piner, supra*, was pending before the Ninth Circuit Court of Appeals, this Court decided *Delaware v. Prouse, supra. Prouse* dealt with the random stop of automobiles by state police for a check of driver's license and registration. Holding that such a stop of an automobile and detention of its occupants constituted a "seizure" within the meaning of the Fourth and Fourteenth Amendments, even though the purpose of the stop was limited and the resulting

detention quite brief,[3] the Court concluded that a "standard of reasonableness" needed to be imposed "upon the exercise of discretion by government officials . . . 'to safeguard the privacy and security of individuals against arbitrary invasions . . . ' (See citations omitted.)" (440 U.S. at 453-454, 99 S. Ct. at 1396.) As to the appropriate test, the Court stated:

> " . . . [T]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interest against its promotion of legitimate governmental interests." (*Id.* at 654, 99 S. Ct. at 1396.)

Utilizing this test, the Court rejected *Delaware's* contention that the "state's interest in discretionary spot checks as a means of ensuring the safety of its roadways outweighs the resulting intrusion on the privacy and security of the person detained." (*Id.* at 659, 99 S. Ct. at 1399.) Noting that checkpoint stops were available as an alternative (citing *United States v. Martinez-Fuerte, supra,* and *United States v. Ortiz, supra,* the Court held:

> "Given the alternative mechanisms available, both those in use and those that might be adopted, we are unconvinced that the incremental contribution to highway safety of the

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[3]See *United States v. Martinez-Fuerte,* 428 U.S. 543, 556-558, 96 S. Ct. 3074, 3082-3083, 49 L. Ed. 2d 1116 (1976); *United States v. Brignoni-Ponce,* 422 U.S. 873, 878, 95 S. Ct. 2574, 2578, 45 L. Ed. 2d 607 (1975); *cf. Terry v. Ohio,* 392 U.S. 1, 16, 88 S. Ct. 1868, 1877, 20 L. Ed. 2d 889 (1968).

> random spot checks justifies the practice under the Fourth Amendment." (440 U.S. at 659, 99 S. Ct. at 1399.)

The *Prouse* decision no doubt allayed any doubts the Ninth Circuit may have had in holding the actions of the Coast Guard unreasonable under the Fourth Amendment.[4] As stated by the appellate court:

> " . . . [W]e note that a concept of subjective intrusion was introduced by the court in *Martinez-Fuerte* and elaborated on in *Prouse*. The Court acknowledged in those cases and in *Ortiz* that a police stop of an individual automobile may have a particularly unsettling effect upon the ordinary person. And we believe that under *Prouse* it is the weight of this subjective intrusion that must be balanced against the governmental need. If the stop of an automobile upon a public highway by an identifiable police car is felt to create such subjective intrusion as to require the use of potentially less intrusive alternatives, surely the stop of an isolated boat after dark, followed by a physical intrusion upon the boat itself, would

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[4] In *Piner*, a Coast Guard cutter was cruising the waters of San Francisco Bay on a routine patrol. At approximately 6:30 p.m., the running lights of the "Delphene," a 43-foot sailboat, were spotted and the decision to board was made. It was stipulated that the only purpose for stopping and boarding was for "a routine safety inspection," that it was done "on a random basis," and that "there were no suspicious circumstances." Once the "Delphene" was boarded and the crew advised that the boarding was for a routine safety inspection, bags of marijuana were observed through an open door. A thorough search of the boat resulted in the seizure of over two tons of marijuana.

> have an unsettling effect immeasurably greater, placing a far greater demand upon the government to come forward with balancing factors." (608 F.2d at 361.)

The Court then concluded:

> " . . . That the random stop and boarding of a vessel after dark for safety and registration inspection without cause to suspect non-compliance is not justified by a governmental need to enforce compliance with safety regulations and constitutes a violation of the Fourth Amendment." (*Id.* at 361.)

Petitioners recognize that both *Piner* and *Prouse* did acknowledge certain situations in which the practices involved in each case would have satisfied Fourth Amendment requirements. This Court stated that its holding:

> " . . . does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all on-coming traffic at roadblack-type stops is one possible alternative." (440 U.S. at 663, 99 S. Ct. at 1401; see also note 26 on same page.)

The *Piner* Court similarly held that a stop and boarding after dark would be justified if based on reasonable cause, such as an articulable suspicion of non-compliance with safety regulations, "or . . . conducted under administrative standards so drafted that the decision to search is not left to the sole discretion of the Coast Guard officer." (608 F.2d at 358.)

Seizing upon this language, the appellate court in the instant case found that *Piner* was not controlling on the grounds that: (1) the stop here did not involve an exercise of

discretion by an officer in the field, but, instead, was conducted pursuant to an "administrative plan," (2) no other feasible, less intrusive means for policing compliance with safety and documentary regulations were shown, and (3) the over-all intrusion here was less than in *Piner*, while the governmental interests were greater. It is submitted that each of the above conclusions were neither supported by the facts legitimately before the trial court or simple logic and basic common sense, and that the Court simply engaged in a number of legal fictions in order to avoid ruling on the obvious Fourth Amendment violations inherent in the actions authorized by the Coast Guard Command.

(1) The Coast Guard Plan Was Arbitrary And Discretionary.

While the appellate court was correct in concluding that the Coast Guard plan did somewhat limit the discretion of the officer in the field, the Court nevertheless ignored the arbitrary and discretionary aspects of the plan itself. While the decision as to which vessels to stop is supposedly no longer vested in the individual Commanders, the specific aspects of the plan concerning the cut-off point for the length of the vessels to be stopped and inspected, the area to be patroled for such vessels, and even the true purpose behind ordering the stops and inspections, were all arbitrary and discretionary decisions made by Coast Guard personnel. What the Coast Guard did, in reality, was, rather than leaving the decision on which vessels to stop to the officer in the field based upon objective Fourth Amendment criteria, the Guard implemented a plan where

all vessels were stopped, no matter *where*, no matter *when* and no matter *why*. Besides the suspect reason behind implementation of the plan in the first place, it is submitted that this is clearly not the type of response the *Prouse* and *Piner* Courts were looking to authorize.

In addition, each Coast Guard Commander still exercised a certain amount of discretion in enforcing the plan. Within the approximate 2-½ million square miles of the Eleventh Coast Guard District, the Commander of the VENTUROUS had to choose what specific "corridors" and "windows" to patrol in order to intercept any vessels. In the event the Commander chose a particularly heavily traveled route and sighted more than one vessel, he would then have had to choose which of the vessels to stop and inspect.

Nor did the plan contain "specific neutral criteria" which limited where the random searches could occur. (See, *e.g., Marshall v. Barlow's Inc.*, 436 U.S. 307, 313, 98 S. Ct. 1816, 1820 (1978). In fact, there really was only one criterion—where in the Eleventh District would the cutters most likely find ships laden with marijuana bound for the United States? In other words, the area to be patrolled was where the sole purpose of the mission could best be carried out.

Even the decision to search vessels only under 200 feet in length was simply one of convenience. The Guard attempted to justify this cut-off point on the ground that, generally, larger commercial vessels are already subject to inspection. Yet, many boats of less than 200 feet—those that carry for hire, people or cargo—are already inspected at regular intervals. Not all boats over 200 feet are engaged

in the merchant marine trade.

Drawing a line at 200 feet also did not mean that the Guard had the capability or intention of conducting safety and document inspections of *all* vessels under 200 feet. It still remained a random and arbitrary determination by the individual Commanders as to what vessel would be boarded. It was as if the Department of Labor had responded to the Court's decision in *Marshall v. Barlow's Inc., supra*, which required a warrant for OSHA inspections, by "limiting" OSHA inspectors to warrantless inspections of small, medium or fairly large businesses, and even certain large businesses that fit some kind of nefarious "profile." In reality, the line drawn by the Coast Guard in its plan was to give the Commanders the wides possible latitude to stop, board and search those vessels believed to be most likely to be carrying multi-ton quantities of marijuana. Any other interpretation of the "administrative plan" or the intention of the Coast Guard for its implementation is absolutely ridiculous.

Finally, the belief by the officer in the field that he had no discretion as to which vessels to stop certainly did not lessen the "subjective intrusion" vis-a-vis the crew. If *Prouse* is read in a common sense manner, it is clear that the random and discretionary aspects of the stops were found objectionable because such practices increased the "subjective intrusion" occasioned by the stops. The discretion, in itself, was not what was objectionable, but, rather, that there were no guidelines that attempted to minimize the "subjective intrusion" which resulted from the exercise of that discretion.

Applying such an analysis to the case at bar, the intrusiveness of the official conduct once on board is not

the issue. On the contrary, it is the boarding *itself* that constitutes the intrusion. And, the Coast Guard's plan did *nothing* to lessen such an intrusion, but, in fact, commanded it.

It is thus submitted that the "administrative plan" formulated by the Coast Guard apparently in response to the Ninth Circuit's decision in *Piner* simply did not address the concerns expressed by the Court in *Piner* or this Court in *Prouse*. The plan provided the Commanders with a standard so overbroad that it was, in fact, no standard at all.

(2) Less Intrusive Alternatives

While petitioners recognize that the efforts of the Coast Guard to enforce compliance with document and safety regulations would be more difficult without the authority to stop and board a vessel at any time, it certainly would not be impossible as the appellate court so concludes.

One such means would be harbor inspections. In *Prouse*, this Court suggested checkpoint stops as a possible alternative to the State of Delaware's plan, since the "subjective intrusion" would be lessened due to the motorist being apprised beforehand of the stop. It is submitted that a harbor can just as easily and effectively be blocked as a highway, For, in a harbor, which is, in reality, a sheltered by, access is only possible through one entrance. Harbors are, in fact, chosen for this reason as being secure from the battering of ocean storms. Most boats have their home port in such a harbor. To set up a checkpoint at the entrance to a harbor, therefore, would be a far more efficient, safe, and economical method of checking boats for safety and document

violations. By virtue of the large number of contacts that would be made, such a practice would be a far more effective means to ensure the safety of American citizens than the somewhat remote possibility of encountering a Coast Guard cutter somewhere in that four-fifths of the earth's surface which constitutes the high seas.

Annual dockside inspections, which were noted to be impracticable by the appellate court, are also a possibility. In the first place, if there is someone in the boat, and the boat is in the water, two requisites for dockside inspection, then the boat is "in use," and compliance with regulations is required. (46 U.S.C. § 1461(c).) In the second place, there is no reason why pleasure craft should not be subject to annual safety and document inspections similar to those in force in many states (*e.g.*, Pennsylvania) with respect to motor vehicles. That proper documentation is a "genuine" concern to the Coast Guard can certainly be inferred from the "administrative plan." Acquisition of proper documentation could be made dependent upon inspection. This very obvious method of ensuring that all vessels comply with the necessary regulations would be a much less wasteful use of police resources than the type of operation now in use.

Lastly, there has been no showing that the obtaining of a search warrant, based upon probable cuase, would not be an acceptable alternative. Warrants are clearly available by radio to Coast Guard personnel acting in a law enforcement capacity (Rule 41(a) and 41(c)(2), F.R. Cr.P.), and, unless this Court is prepared to rule that a different standard applies to searches and seizures on the high seas, no reason exists why the Coast Guard should not be bound

by the same standard. As stated by Judge Schwarzer, United States District Court Judge for the Northern District of California, in originally striking down the search in *Piner*:

> "The Court is not convinced that a procedure under which the Coast Guard must obtain a warrant or which otherwise circumscribes the discretion of its personnel at sea to board vessels will seriously burden or diminish the effectiveness of the regulatory system. *Marshall v. Barlow's Inc.*, 98 S. Ct. 1816. The public interest in the enforcement of boat safety regulations has not been shown to be a matter of such urgency as to justify the boarding by Coast Guard personnel at all hours and places of boats selected by them in their unrestrained discretion. The enforcement problem confronting the Coast Guard is no more serious than that confronting the Border Patrol whose roving discretionary patrol stops and searches have been held to infringe Fourth Amendment interests. (See citations omitted.)" (452 F. Supp. 1335, 1340 [N.D. Cal. 1978].)

(3) Intrusion On Privacy Interests Versus Governmental Interest In Securing Compliance With Document And Safety Regulations.

Petitioners do not quarrel with the proposition that due to the numerous functions the Coast Guard is empowered and relied upon to perform, the Guard should be granted very broad authority in its efforts to enforce and assist in the enforcement of all applicable federal laws upon the high seas and waters subject to the jurisdiction of the

United States. Specifically, in connection with its law enforcement activities, the Coast Guard is given statutory authority to board vessels and to make "searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violation of laws of the United States." (14 U.S.C. § 89(a).) This statute has been held to be constitutional, and some Courts, as previously indicated, have even held that the Fourth Amendment does not place any limits on the Guard's authority to board vessels and conduct registration or safety inspections. See, *e.g.*, *United States v. Williams*, 617 F.2d 1063 (5th Cir. 1980) (en banc); *United States v. Warren*, 578 F.2d 1058 (5th Cir. 1978) (en banc); *United States v. Hilton*, 619 F.2d 127 (1st Cir. 1980); *United States v. Miller*, 589 F.2d 1117 (1st Cir. 1978), *cert. den.*, 440 U.S. 958, 99 S. Ct. 1499 (1979); *United States v. Harper*, 617 F.2d 35 (4th Cir.), *cert. den.*, 449 U.S. 887, 101 S. Ct. 243 (1980); *United States v. Clark*, 664 F.2d 1174 (11th Cir. 1981) (*per curiam*). It is submitted that not only do these decisions, as well as the decision in the instant case, ignore what an intrusion upon Fourth Amendment interests are entailed by such vessel inspections, but that these Courts are simply incorrect, as "the Coast Guard's authority must be subject to the limitations imposed by the Fourth Amendment, because no act of Congress can authorize a violation of the Constitution." *United States v. Odneal*, 565 F.2d 598, 601 (9th Cir. 1977), *cert. den.*, 435 U.S. 952, 98 S. Ct. 1581 (1978), relying upon *Almeida-Sanchez v. United States, supra;* see also *United States v. Raub*, 637 F.2d 1205, 1208 (9th Cir. 1980).

Within the excellent Fourth Amendment discussion

contained in the *Prouse* opinion, this Court dealt with the evil inherent in a plan which authorized the routine stopping and inspecting of any vehicle traveling on a State's highway. To such a plan, which is precisely what the plan in this case involved, the Court had the following to say:

> "The marginal contribution to roadway safety possibly resulting from a system of spot checks cannot justify subjecting *every occupant of every vehicle* on the roads to a seizure–limited in magnitude compared to other intrusions but nonetheless constitutionally cognizable–at the unbridled discretion of law enforcement officials. To insist upon neither an appropriate factual basis for suspicion directed at a particular automobile nor upon some other substantial and objective standard or rule to govern the exercise of discretion 'would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches . . . ' *Terry v. Ohio, supra,* 392 U.S. at 22, 88 S. Ct. at 1880. By hypothesis, stopping apparently safe drivers is necessary only because the danger presented by some drivers is not observable at the time of the stop. When there is not probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations–nor other articulable basis amounting to reasonable suspicion that the driver is unlicensed or his vehicle unregistered–we cannot conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more

> productive than stopping any other driver." (440 U.S. at 661, 99 S. Ct. at 1440; emphasis added and footnote omitted.)

The same concerns relating to the privacy interests of motorists which caused the *Prouse* Court to impose Fourth Amendment limitations on the stops involved in that case are also present in the instant case. Merely causing a vessel to alter its course or speed involves an interference with the individual's right of free movement and is thus closely analogous to the investigatory stops of individuals and automobiles recognized by the *Prouse* decision as constituting "seizures" of the person. Safety inspections also involve a boarding and a comprehensive search, which creates significant intrusions upon the distinct individual interest in privacy. The boarding alone provides a close view of areas of the vessel which the individual may justifiably seek to reserve as private. Furthermore, the safety search may entail a thorough examination of virtually *all* areas of the vessel. For example, it is standard procedure for the Coast Guard to compare the vessel's main beam number with the number on its registration papers, which may take the inspector into the hull of a commercial or semi-commercial craft or into the main living area of the pleasure vessel. Other areas of the vessel, including the engine room or compartment in the marine toilet, are also routinely subject to inspection.[5]

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[5]See United States Coast Guard, U. S. Dept. of Transp., Boarding Manual § III-IV, at 3 - 4 (1977); see also *United States v. Hilton*, 469 F. Supp. 94, 98, note 4 (D. Ma. 1979) (describing check of main beam number in engine room and noting that normal safety inspection includes check of engine room, in any event).

The Court should also consider the fact that vessels are oftentimes used by sailors at sea as their actual home, and that vessels should thus be accorded a much greater expectation of privacy than automobiles. As stated by the Fifth Circuit in *United States v. Cadena*, 558 F.2d 100 (1979):

> " . . . there are differences [in the use of vessels as compared with automobiles]. Save for the ever-increasing number of vacation vehicles and mobile homes, motor vehicles are not designed to be used as residences. The ship is the sailor's home. There is hardly the expectation of privacy even in the curtained limousine or the stereo-equipped van that every mariner or yachtsman expects aboard his vessel. . . . We . . . conclude that the increased measure of privacy that may be expected by those aboard a vessel mandates careful scrutiny both of the circumstances excusing the failure to secure a warrant . . . ."

While the statistics on boating safety relied upon by the appellate court were enlightening, they still did not support random, warrantless, nighttime safety inspections. While tragic, these numbers were extremely small when compared to the annual 50,000 deaths on the nation's highways. As recently observed in a 1980 Harvard Law Review article:

> "While the government surely has a legitimate interest in promoting safety at sea, the over-all importance of equipment inspection to the

> promotion of safety is limited by the fact that only a relatively small number of accidents and fatalities are caused by equipment deficiencies of the type which are presently checked for by the Coast Guard." *High on the Seas: Drug Smuggling, the Fourth Amendment and Warrantless Searches at Sea,* HARVARD LAW REVIEW, Vol. 93, pp. 725, 741-742 (1980).

Nor can it seriously be argued that "pleasure boating" is the type of commercial enterprise that has been so pervasively regulated as to fall within the administrative search exception. See *United States v. Biswell,* 406 U.S. 311, 92 S. Ct. 1593 (1972) [federal regulation of firearms] *Colonnade Catering Corp. v. United States,* 397 U.S. 72, 90 S. Ct. 774 (1970) [federal regulation of liquor]. In *Marshall v. Barlow's Inc., supra,* the Supreme Court clarified this administrative search exception. The distinguishing element giving rise to the exception in pervasively regulated *Biswell* businesses or traditionally regulated *Colonnade* industries, said the Court, is the awareness and expectation by a person entering such a business that he is subjecting himself to Government supervision and regulation. Under these conditions, no reasonable expectation of privacy can exist for the proprietor of the enterprise. As had been previously stated by this Court in *Almeida-Sanchez v. United States, supra:*

> "Citizens engaged in such federally licensed and regulated enterprises [must] accept the burdens as well as the benefits of their trade . . . . The businessman in a regulated industry in effect

consents to the restrictions placed upon him." (413 U.S. at 271, 93 S. Ct. at 2538.)

In the recent Supreme Court decision of *Donovan v. Dewey*, ... U.S. ..... (June 17, 1981), Justice Marshal, writing for the majority, reaffirmed the principle that legislative schemes authorizing warrantless administrative searches of commercial property do not necessarily violate the Fourth Amendment "when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the Federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." Concluding that anyone involved in the mining industry could not help but be aware that he "will be subject to effective inspection," the Court upheld the warrantless inspections of mines and quarries under the Mine Safety and Health Act.

Judged against these criteria, it would be unreasonable to suggest that a person engaged in recreational activity such as "pleasure boating" would have no real expectation that his vessel might be subject to inspection, at any time and at any place, by Coast Guard personnel. Without the "relatively unique circumstances" to indicate to an individual that his activity is subject to a regulatory scheme authorizing warrantless inspections, traditional Fourth Amendment criteria should govern such regulatory inspections.

In *Klutz v. Beam*, 374 F. Supp. 1129 (W.D.N.C. 1973), a three-judge district court reached such a conclusion,

finding random safety inspections unconstitutional. Although that case involved a lake and not the high seas, it involved a statute similar to 14 U.S.C. § 89(a) in that it authorized officers to board and inspect any boat to ensure that its equipment met all statutory safety requirements. The statute made no mention of a warrant. In finding that a warrantless boarding without probable cause violated the Constitution, the Court commented at p. 1133:

> "Even without warrants, the state could reasonably establish a procedure similar to that involving motor vehicles, requiring periodic inspection of safety and sanitation features with the posting of a sticker showing compliance with such inspection at a recorded time, and the state could make it unlawful to operate a boat without such a duly issued and current sticker appropriately displayed. However, possible emergencies aside, warrantless searches against the owner's will of a boat on a landlocked lake, which can be repeated, willy-nilly, by that inspector or any other inspector who chooses to board the boat, is an oppressive and unreasonable–and unconstitutional–burden not justified by the consideration of sanitation and safety advanced by the state."

In the recent case of *United States v. Streifel*, 665 F.2d 414 (1981), the Second Circuit, while approving the Coast Guard's warrantless boarding of a foreign vessel 200 miles off the New England coast, held that there was "no compelling reason to fashion a different set of principles for treatment of searches and seizures on the high seas than

have been developed by *Terry* and its progeny." (*Id.* at 423.) The Court thus concluded that any land-sea difference in governmental need or in intrusiveness effects only how Fourth Amendment principles are applied, not their applicability.

In summary, it is contended that the standard of articulable and reasonable suspicion applied by this Court in *Terry v. Ohio, supra; Almeida-Sanchez v. United States, supra; United States v. Brignoni-Ponce, supra; United States v. Ortiz, supra; United States v. Martinez-Fuerte, supra;* and *Delaware v. Prouse, supra,* is the appropriate standard to judge the constitutionality of the Coast Guard's plan to board *all* United States vessels whenever and wherever encountered on the high seas. The stop in the instant case–involving the hailing of a vessel at sea, during the nighttime, by a roving patrol, and then a boarding of that vessel, after which the vessel's occupants were ordered to stand aside while an indiscriminate search of any area of the vessel is conducted–certainly created a greater objective *and* subjective intrusion than involved in a roving patrol stop of an automobile. While certain steps were taken to minimize the concerns or fright the crew of the GLOBE TROTTER might have had, such precautions, in the balancing equation, still did not outweigh the constitutional right to be free from governmental interference in the absence of specific and articulable facts justifying the particular intrusion.

Based upon a "reasonable" interpretation of the protections afforded United States citizens under the Fourth Amendment, therefore, it is respectfully submitted that the actions of the Coast Guard, committed pursuant

to the "administrative plan," should have been struck down as grossly violative of the Fourth Amendment.

B. The Use By The Coast Guard Of Its Document And Safety Inspection Authority As A Pretext To Search For Marijuana And Other Contraband Required A Finding That The Stop and Boarding Of The GLOBE TROTTER Was Illegal.

In the court below, the Government stipulated that if called and sworn as a witness, Commander Chapman would have testified that,

> " My written orders, instructed me to proceed south to an area approximately 100 miles west of the mouth of the Gulf of California via specified way points and return. During the patrol, as part of a general administrative plan, I was to board and inspect all United States vessels less than 200 feet in length by patrolling specific windows or corridors located at established points in the Pacific. I was thereby to attempt to interdict vessels of American registry which were involved in drug trafficking which vessels carried controlled substances destined for the United States."

Indeed, the Government conceded in its Opening Brief that "one of the purposes of the administrative plan was to attempt to interdict the flow of marijuana into [the United States]." The appellate court implied from this concession that the corridors and windows of the VENTUROUS' patrol were chosen because they were

areas of suspected drug trafficking.[6]

Even with this recognition of the true and only purpose behind the implementation of the "administrative plan," the appellate court still refused to consider any criminal enforcement interest the Coast Guard may have

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[6]An indication of what practices are used in the Coast Guard can be found in the Boston Globe, September 17, 1978 (Parade Magazine), at p. 7:

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> "If we suspect a ship of carrying narcotics and it doesn't stop . . . [w]arning shots usually stop them. Then we board, usually with five men in a smaller boat, well armed. We say we are operating under the law . . . It is a subterfuge. We say we are running a check for 'compliance with U. S. law.' Or we say: 'We are authorized under umpty umpty umpt of the government something,' and we board.
>
> "If it is empty, we do a *routine* safety inspection . . . ."

(Statement of Commander John Streeper, U.S.C.G., Head of General Law Enforcement Section.) See also *Drug Smuggling (San Juan, P.R.): Hearings Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries*, 94th Cong., 1st Sess. 13 (1975):

> "By the placement of a Customs Patrol Officer on board a Coast Guard vessel, thus utilizing the Coast Guard authority to hail American vessels . . . for the purpose of performing safety and documentation checks . . ., the first waive of the attack is launched . . . . The Coast Guard provides the entree and the Customs officer provides the expertise and experience in concealment techniques, drug identification and interdiction."

(Statement of Albert Bazemore, Regional Comm'r. of Customs, at 23 - 24.)

had, relying instead on the "independent administration justification" for the plan. If the words "document and safety inspection" had been mentioned anywhere in the orders received by Commander Chapman, then counsel might have been able to understand how the appellate court concluded that there was an administrative purpose behind the plan. Such, though, was not the case. The only common sense conclusion that could have been drawn from the stipulation and other facts was that the Coast Guard, pursuant to its authority to conduct document and safety inspections, was authorizing its Commanders to board United States flagged vessels for the *exclusive* purpose of looking around in the hope of finding contraband. Any other interpretation of the Coast Guard's intention would be ludicrous.

This Court has previously recognized in a number of cases that where a search or seizure is conducted with the purpose of discovering evidence that may be used in a criminal prosecution, the reasonableness of the seizure is judged by standards applicable to criminal investigations, that is, probable cause.[7] In *Michigan v. Tyler*, 436 U.S. 499, 98 S. Ct. 1942 (1978), a case that involved several entries into a premises made during, immediately after, and sometime after a fire, the Court held the initial entries valid under the administrative inspection standard. A later entry,

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[7] As the alleged administrative inspection conducted in the instant case was just a pretext for discovering evidence that could be used in a criminal prosecution, the Fourth Amendment's probable cause standard was the appropriate standard by which to judge the conduct of the Coast Guard.

however, made for the purpose of investigating a possible crime (arson) was held invalid. In so holding, the Court adopted the language of the Michigan Supreme Court and stated:

> " 'Where the cause [of the fire] is undetermined, and the purpose of the investigation is to determine the cause and to prevent such fires from occurring or recurring, a . . . search may be conducted pursuant to a warrant issued in accordance with reasonable legislative or administrative standards or, absent their promulgation, judicially prescribed standards; if evidence of wrongdoing is discovered, it may, of course, be used to establish probable cause for the issuance of a criminal investigative search warrant or in prosecution.' But, *if the authorities are seeking evidence to be used in a criminal prosecution, the usual standard [of probable cause] will apply.*' 399 Mich., at 584, 250 N.W.2d, at 477." (436 U.S. at 508, 98 S. Ct. at 1949; emphasis added.)

Again, in *Camara v. Municipal Court*, 387 U.S. 523, 87 S. Ct. 1727 (1967), the Court pointed out that:

> "[I]n a criminal investigation, the police may undertake to recover specific stolen or contraband goods. But that public interest would hardly justify a sweeping search of an entire city in the hope that these goods might be found. Consequently, a search for these goods, even with a warrant, is 'reasonable' only when there is 'probable cause' to believe they will be uncovered in a particular [place]." (387 U.S. at 535, 87 S. Ct. at

1734.)

Finally, as Justice Blackmun stated in his concurring opinion in *Delaware v. Prouse, supra:*

> "[A] random license check on a motorist operating a vehicle on highways owned and maintained by the State is quite different from a random stop to uncover violations of laws that have nothing to do [with license violations]." (440 U.S. at 664, 99 S. Ct. at 1401.)

Thus, where an administrative seizure or search is made with the objective of uncovering evidence to be used in a criminal prosecution, standards governing administrative seizures and searches will not be enough. The Government will have to justify the intrusion based on traditional concepts of probable cause. As stated by the Court in *Abel v. United States,* 362 U.S. 217, 80 S. Ct. 683 (1960):

> "We emphasize again that our view of the matter would be totally different had the evidence established, or where the courts below were not justified in finding, that the administrative warrant was here employed as an instrument of criminal law enforcement to circumvent the latter's legal restrictions, rather than as a bona fide preliminary step in a deportation proceeding. The test is whether the decision to proceed administratively toward deportation was influenced by, and was carried out for, a purpose of amassing evidence in the prosecution for crime." (362 U.S. at 230, 80 S. Ct. at 692.)

The various Circuit Courts of Appeals have also discussed this issue. In *United States v. Davis*, 482 F.2d 983 (1973), the Ninth Circuit ruled on the constitutionality of airport searches of deporting passengers in the wake of a rash of airline hijackings. Upholding the search because of "the essentially administrative nature of the screening process," the Court warned that:

> "There is an obvious danger, nonetheless, that the screening of passengers and their carry-on luggage for weapons and explosive *will be subverted into a general search for evidence of crime.* If this occurs, the courts will exclude the evidence obtained." (*Id.* at 909, footnote omitted; emphasis added.)

In *Taglavore v. United States*, 291 F.2d 626 (1961), the Ninth Circuit strongly condemned the practice of using a valid arrest for a traffic misdemeanor as a pretext or subterfuge to search for marijuana. In language that addressed the formidable taks of the Coast Guard today, the Court stated that "in no field of law enforcement and detection is the work of the law officers more difficult [than in narcotics cases]; yet, difficult as detection may be, the arm of the law extends constitutional safeguards which must be respected." (*Id.* at 264.) The facts of *Taglavore* were that an inspector of police thought the defendant was carrying marijuana on his person. He ordered two of his officers to arrest Taglavore on a warrant for two traffic violations. The inspector specifically advised the officers to be alert for marijuana. The arrest was admittedly valid. Nevertheless, the Court struck down the search, stating:

> "Where the arrest is only a sham or a front being

> used as an excuse for making a search, the arrest itself and the ensuing search are illegal . . . . Were the use of misdemeanor arrest warrants as a pretext for searching people suspected of felonies to be permitted, a mockery could be made of the Fourth Amendment and its guarantees." (*Id.* at 266.)

In an analogous situation, pretext stops of automobiles to check licenses and registration, the Courts have not hesitated to strike down the abuse of legitimate authority. In *United States v. Carrizoza-Gaxiola*, 523 F.2d 239 (9th Cir. 1975), the Government, on appeal, sought to justify a car stop as a valid check of license and registration, when in fact the officers had stopped the car because they were suspicious of car theft based on a stolen car profile. The granting of the motion to suppress was upheld. Likewise, in *Amador-Gonzalez v. United States*, 391 F.2d 308 (5th Cir. 1968), the Court struck down a search for narcotics following a traffic arrest, stating that "[t]he arrest must not be a mere pretext for an otherwise illegitimate search." (*Id.* at 313.)

Prior to this Court's ruling in *Prouse*, numerous courts had held that if a valid stop for a license check were used as a pretext, the subsequent search violated the Fourth Amendment.[8]

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[8]See *United States v. Cupps*, 503 F.2d 277 (6th Cir. 1974); *People v. McPherson*, 550 P.2d 311, 314 (1976) [safety check permissible if "not merely a ruse or a guise to conduct searches of cars"]; *Iowa v. Cooley*, 229 N.W.2d 755 (1975); *Palmore v. United States*, 290 A. 2d 573, 582 (D.C. 1972) ["spot check is not to be used as a substitute for a search for evidence of some possible crime unrelated to possession

The Ninth Circuit decision in *United States v. Hellman*, 556 F.2d 442 (1977), also disapproved of pretext seizures in another vehicle situation. The Court held that if impounding and inventorying of a car was a pretext for "an investigatory police motive," that the warrantless search of the car was unreasonable and the evidence seized should have been suppressed. The Court noted that the Supreme Court in upholding routine car inventory searches in *South Dakota v. Opperman*, 428 U.S. 364, 96 S. Ct. 3092 (1976), had made it clear that:

> "[T]here is no suggestion whatever that his standard procedure, essentially like that followed throughout the country, was a pretext concealing an investigatory police notice. 428 U.S. at 376, 96 S. Ct. at 3100." (Footnote omitted.)[9]

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of a driver's permit"]; *People v. Harr*, 235 N.E.2d 1 (Ill. 1968) [police cannot use license check "as a mere subterfuge to obtain information or evidence not related to the licensing requirement"]; *Nebraska v. Holmberg*, 231 N.W.2d 672, 678 ["We hasten to state, specifically and emphatically, that a spot check is not to be used as a pretext to search for evidence of some [unrelated] crime"]; *Morgan v. Town of Heidelberg*, 150 So. 2d 512, 515 (Miss. 1963) ["When the officer's primary purpose in stopping the motorist is not to inspect his license, but to examine the contents of the vehicle, the detention is . . . a mere subterfuge . . . for a failure to procure a warrant"].

[9]See *State v. Gwinn*, 301 A.2d 291 (Del. 1973) [automobile inventory is permissible if "not under pretext to gather evidence without a warrant"]; *Gonzalez v. Oklahoma*, 507 P.2d 1277 (1973) [where police inventory is a subterfuge, based on suspicion that contraband might be stored in the vehicle, the discovery of such contraband is inadmissible and the police inventory void *ab initio*].

While certain Courts, that have dealt with this issue in the very same factual setting as that in the instant case, have rejected the pretext claim, those cases did not involve allegations of a distric-wide plan to use safety searches to look for marijuana. In other words, there was not evidence to the effect that the primary, motivating force behind the stop and boarding was to search for drugs.

In a memorandum to Admiral Parker, then head of the Eleventh District, Commander James Meade, legal counsel for the District and a 24-year veteran of the Coast Guard, wrote about options in light of the Ninth Circuit's ruling in *Piner*. Commander Meade wrote that:

> "[I]n recent years, the Coast Guard has become involved in the enforcement of criminal law, as opposed to regulatory/safety law. If we are honest, we would probably admit that as many boardings are conducted to look for drugs as for PFDs, i.e., we are now really into 'searches' as opposed to 'inspections.'"

When Commander Meade revealed the modus operandi of the Coast Guard, he obviously never believed his warnings would be revealed. But, a more apt statement of the current practices of the Guard could not be written.

One of the principles that is unique to our constitutional system is that "fairness" to the defendant should be of overriding concern in the execution of law enforcement. Principles such as the "exclusionary rule" and "entrapment" indicate that even the "guilt" of a defendant does not outweigh the mandate for law enforcement to maintain propriety. That the "ends do not justify the means" is really a truism in the criminal area. Thus, to permit the type of blatant misuse

of authority that the Coast Guard has been engaging in is to sanction hypocrisy and deceit in American Jurisprudence.

CONCLUSION

For the above-mentioned reasons, petitioners JACK OSBORN WATSON, JEFFREY CRAIG EVENSON and DALE STANLEY BROWNING respectfully request that this Honorable Court grant the instant Petition for Writ of Certiorari.

Respectfully submitted,

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Annexed:

"A" Opinion of the Court Below - filed June 2, 1982

"B" Denial of Petition for Rehearing En Banc - filed August 19, 1982.